CLERK'S COPY

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 248.

F. H. HARTMAN, PLAINTIFF IN ERROR

vs.

BUTTERFIELD LUMBER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED JUNE 4, 1904.

(19,388.)

(19,388.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 288.

F. H. HARTMAN, PLAINTIFF IN ERROR,

vs.

BUTTERFIELD LUMBER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 13, 1905.

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a STATE OF MISSISSIPPI:

Supreme Court, March Term, A. D. 1903.

MONDAY, March 2, 1903.

Pleas and proceedings had and done at a regular term of the supreme court of Mississippi, begun and held in the court room, in the capitol, in the city of Jackson, on the first Monday, the 2nd day, of March, A. D. 1903.

Present: The Honorable Albert H. Whitfield, chief justice, and the Honorable S. H. Terral and the Honorable S. S. Calhoon, associate justices, E. W. Brown, clerk of said court, and C. L. Johnson, marshal.

The following proceedings were had in the case of Butterfield Lumber Company *vs.* F. H. Hartman:

b 2nd District Chancery Court, Lincoln County.

BUTTERFIELD LUMBER CO. vs. F. H. HARTMAN. } No. 10881.

Filed April 2, 1903.

E. W. BROWN, Clerk,
By W. J. BROWN, JR., D. C.

March term, 1903.
Submitted April 20, 1903. L. 624.
Reversed and decree here May 4, 1903.
Suggestion of error overruled May 12, 1903. L. 636.

1 STATE OF MISSISSIPPI, Lincoln County.

In the Chancery Court, September Term, 1901.

BUTTERFIELD LUMBER COMPANY, a Corporation Existing under the Laws of the State of Mississippi and Domiciled and Doing Business in the Village of Norfield, County of Lincoln, State of Mississippi, Complainant,

vs.

F. H. HARTMAN, a Citizen of Lincoln County, State of Mississippi, and Hartman Mercantile Company, a Corporation Existing under the Laws of the State and Domiciled and Doing Business in the City of Brookhaven, County of Lincoln, State of Mississippi, and Hartman Lumber Company, a Corporation of said County and State, Defendants.

To the honorable chancery court of said State and county:

Your complainant in the above styled cause hereby complaining shows to the court as follows:

That Esau Harness during the year 1893 received a patent from the U. S. A. Government to the following described land situated in Lincoln county, Mississippi,—S. W. ¼ of N. E. ¼ & S. E. ¼ of N. W. ¼ and W. 1/w of S. E. ¼, sec. 36, T. 5, range 9, east, by virtue of which he became the owner thereof. That prior to the 28th day of January 1893, for a valuable consideration he entered into a contract to sell the pine timber on said land and a right of way for a railroad over said land one hundred feet in width to Norfield & Butterfield Company and in pursuance and in fulfillment thereof he and his wife Loreny Harness upon said date sold, conveyed and warranted to said Norwood and Butterfield Company said timber upon said land and a right of way 100 feet wide for a railroad over said land to be located and laid off at the pleasure of said Norwood and Butterfield Company. Said deed of conveyance was filed for record upon Feb. 10, 1893 and recorded in Book "A A A" page 188 of the records of the office of the chancery clerk of Lincoln county. Said record was destroyed and said deed was refiled for record Sept. 24th 1894 and recorded in Book "7" p. 99 of said office.

The record of which is hereby prayed to be taken and con-
2 sidered as a part of the bill of complaint.

That Norwood and Butterfield Company for a valuable consideration sold and conveyed to Butterfield Lumber Company said timber upon said land and said right of way upon the — day of ——, A. D. 1900 which deed of conveyance is recorded in Deed Book — page — of said office and record of which is now prayed to be taken as a part of this bill of vomplaint.

That Butterfield Lumber Company is now the owner of all the pine timber upon said land and a strip of land one hundred feet wide to be laid off and located at its pleasure across said land as shown by the foregoing derangement of its title, it being the purchaser thereof for a valuable consideration.

That upon January 30th 1893 said Esau Harness and his wife Loreny Harness made, executed and delivered to F. H. Hartman a deed in trust by which they conveyed said land to W. F. Parsons trustee. Said deed in trust was filed for record upon January the 31st, 1893, and recorded in Book 20 page 385 of said office, the record of which is now prayed to be taken as a part thereof.

That upon December 14th 1894 said land under said deed in trust was sold by W. F. Parsons, trustee and purchased by F. H. Hartman. Said deed was filed for record December the 14th 1894 and recorded in Book "6" page "567" which record is now prayed to be considered a part of this bill of complaint.

That F. H. Hartman, your complainant is advised, has conveyed said land to Hartman Lumber Company or to Hartman Mercantile Company, and that they claim said land or he now claims to own said land by virtue of the above mentioned trustee's deed.

That it will thus be seen that the complainant's vendor had a contract to purchase said timber and right of way, and in pursuance thereof it purchased it before it was sold to F. H. Hartman.

Still complainant's vendor's deed was not recorded until after said deed in trust was executed and delivered to F. H. Hartman, and that F. H. Hartman or the Hartman Lumber Company or the Hartman Mercantile Company, through stockholders claims
3 to own said timber and land and contends that complainants have no title to said timber and right of way because the deed in trust to F. H. Hartman was recorded before the deed to the Norwood and Butterfield Company.

Your complainant here charges and avers that the defendant F. H. Hartman and his vendors had actual notice of the contract between Norwood and Butterfield Company and Esau Harness.

It further charges that the defendant F. H. Hartman had actual notice and knowledge of the sale of said timber to said Norwood and Butterfield Company before he secured the hereinbefore mentioned deed in trust and deed thereunder to said land. That after said knowledge he secured said deed in trust and hurried it upon record to defeat your complainant's rights.

That said defendants are the rightful owners of said land and timber conveyed to complainant's vendor and that the hereinbefore mentioned trustee's deed conveyed said land to said F. H. Hartman and said hereinbefore mentioned deed in trust under which said land was sold cast a cloud, doubt or suspicion on complainant's title thereto.

The premises considered your complainant prays that the defendant be commanded by summons to appear before the chancery court of the State and county at its September 1901 term to answer the allegations charged herein.

Upon the final hearing of this cause your complainant prays the said trustee's deed to F. H. Hartman in so far as it conveys the pine timber on said land and said strip of land one hundred feet wide to be used as a right of way across said land be cancelled because it cast a cloud, doubt or suspicion on complainant's title thereto.

Your complainant further prays that because of the knowledge of all of the defendants before they purchased, if they did purchase, or before the defendant F. H. Hartman secured his deed in trust hereinbefore described, of the contract and deed to Norwood & Butterfield Company by the said Esau Harness and his wife. Said defendants will be adjudged to have no title to said timber and right of way, but that complainant will be decreed and adjudged
4 to have a good and perfect title thereto.

If complainant has prayed for wrong or insufficient relief then grant it such relief as it is in equity under the facts of this case entitled to receive, in duty bound it will ever pray.

BUTTERFIELD LUMBER COMPANY,
Complainant,

By T. BRADY, Jr., Solicitor.

STATE OF MISSISSIPPI,
County of Lincoln.

Personally appeared before me the undersigned mayor and *ex-officio* justice of the peace, the within named J. S. Butterfield, who being duly sworn sayd he is president of the Butterfield Lumber Company, and the facts stated in the foregoing bill of complaint are, he believes, as stated.

J. C. OSBORN,
Mayor and *ex-Officio* J. P.

Filed August 26th A. D. 1901.

R. W. McNAIR.

5 STATE OF MISSISSIPPI,
County of Lincoln.

Chancery Court.

To the sheriff of Lincoln county, Greeting:

You are hereby commanded to summon F. H. Hartman and the Hartman Mercantile Company, if to be found in your county, to be and personally appear before the chancery court of Lincoln county, at the court house of said county, in the town of Brookhaven, on the third Monday of September 1901, then and there to answer the allegations of a bill of complaint against them by the Butterfield Lumber Co.

Herein fail not, and have you then and there this writ.

Issued under my hand and seal of said court, at office, in Brookhaven, the 26th day of August 1901.

R. W. McNAIR, Clerk.

Endorsed on back as follows:

Sheriff's Return.

STATE OF MISSISSIPPI,
County of Lincoln.

Executed the within writ this 31st day of August 1901, by delivering a true copy to F. H. Hartman for Hartman Mercantile Company, F. H. Hartman being a member of said firm.

R. R. APPLEWHITE*M*, Sheriff,
By J. D. BLUE, D. S.

6 BUTTERFIELD L'B'R CO.
vs.
F. H. HARTMAN ET AL. } No. 1632.

By consent the defendants are allowed sixty days in which to answer as of this term and without prejudice to a trial at the next term of court.

Done this 16th day of Sept. A. D. 1901.

H. C. CONN, Chancellor.

7 In the Chancery Court of Lincoln County, Mississippi.

BUTTERFIELD LUMBER CO.
vs.
F. H. HARTMAN ET AL. } No. 1632.

The Joint and Separate Answer of the Defendant to the Bill of Complaint.

The defendants, saving and reserving all manner and benefit of exception that might or could be taken to the sufficiency of the said bill of complainant, for answer thereto and to such parts thereof as they deem it material to answer, say:

The Hartman Mercnatile Company and the Hartman Lumber Company disclaim any interest and say that they, nor neither of them, have no interest whatever in the land described in the bill, nor in the pine timber growing therein.

The defendant F. H. Hartman says it is true that Esau Harness was at one time the owner of said land and timber, and that he acquired his title from the United States.

He is not advised as to the contract alleged by the complainant to have been made with the said Esau Harness prior to or on the 28th day of January, A. D. 1903, (he admits however that there is a conveyance of record for the timber on said land bearing date January 28, 1893) and which was filed for record February 10th, 1893, and that the record was destroyed by fire, and that the said timber deed had been re-recorded.

Defendant says that on January 30th, 1893, said Esau Harness and his wife Loreny Harness executed and delivered to defendant a deed in trust by which they conveyed said land to W. F. Parsons, trustee, and that said deed in trust was filed for record January 31st, 1893, and that upon December 14th, 1894 said land under said deed in trust was sold by W. F. Parsons, trustee, and purchased by this defendant, and that said W. F. Parsons, trustee, executed a trustee's deed which was filed for record Dec. 17th, 1894.

He denies that he has sold the land to the Hartman Lumber Company or to the Hartman Mercantile Company. The defendant

8 F. H. Hartman, denies that he had actual notice of the contract alleged to have been made between Norwood and Butterfield Lumber Company and Esau Harness. He denies that he had actual notice of the sale of said timber to said Norwood and Butterfield Lumber Company before he secured the deed in trust; he denies that after such knowledge he secured said deed in trust and hurried it upon record to defeat complainant's rights; he denies that he is not the rightful owner of said land, and he denies that the deed in trust and the trustee's deed thereunder cast a cloud, doubt or suspicion upon complainant's title.

He denies that the complainant is the owner of the timber on said land or any interest therein.

And now having fully answered he prays to be hence dismissed with his reasonable costs most wrongfully expended.

F. H. HARTMAN, Defendant,
By P. Z. JONES, His Solicitor.

STATE OF MISSISSIPPI,
Lincoln County.

Personally appeared before the undersigned chancery clerk of said county, the above named F. H. Hartman, who being duly sworn says on oath that to the best of his knowledge and belief the facts stated in the foregoing answer are true and correct as therein stated.

F. H. HARTMAN.

Sworn to and subscribed before me, Feb'y 19th, 1902.

R. W. McNAIR, Clerk.

Filed Febr'y 19, 1902.

R. W. McNAIR, Clerk.

9 STATE OF MISSISSIPPI,
County of Lincoln.

Be it remembered that on the third Monday in February, the same being the — day thereof A. D. 1902, the chancery court of Lincoln county, State of Mississippi, in pursuance to the laws thereof met at the court house in said county, at Brookhaven, Mississippi, and there were present R. R. Applewhite, sheriff of said county, and R. W. McNair, chancery clerk of said county, and H. C. Conn, chancellor, being present and presiding, there came on to be heard on the — day of said term upon bill and answer and testimony which was by agreement taken in open court in the hereinafter mentioned cause, the style — which is as follows, towit—Butterfield Lumber Co. *vs.* F. H. Hartman *et al.* when the following proceedings were had and done, towit:

Complainant offered and read in evidence deed from Esau Harness and wife to Norwood and Butterfield Lumber Company, which was in the following words and figures towit:

Warranty Deed.

STATE OF MISSISSIPPI,
Lincoln County.

Esau Harness and Wife to Norwood and Butterfield Co.

In consideration of the sum of three hundred eighty seven dollars and fifty cents cash in hand paid, the receipt of which is hereby acknowledged,

We convey and warrant to Norwood & Butterfield Company all the pine timber on the land described as the S. W. ¼ of N. E. ¼ and S. E. ¼ of the N. W. ¼ and the W. ¼ of S. E. ¼ section thirty six (36) township (5) range (9) east, situated in the county of Lincoln and State of Miss. We further convey and warrant to said company a right of way on through and across said lands for road trains or railroads one hundred (100) feet wide to be laid off at will and pleasure of said Norwood and Butterfield Company.

10 Witness our signatures the 28th day of January 1893.

his
ESAU x HARNESS. [SEAL.]
mark.

her
LORENY x HARNESS. [SEAL.]
mark.

Signed, sealed and delivered in the presence of us.
W. H. FELDER.

THE STATE OF MISSISSIPPI, }
Lincoln County. }

Personally appeared before me W. C. Price, a member of the board of supervisors in and for the county of Lincoln, the within named Esau Harness and Loreny Harness his wife, who acknowledged that they signed and delivered the foregoing instrument on the day and year therein mentioned.

Given under my hand and seal of said court this 28th day of January 1893.

W. C. PRICE, M. B. S.

Filed for record Feb'y 10th, 1893, at 10 o'clock a. m.
Recorded in Book "A A" page 188.

FELIX MAY, Clerk.

11 A deed from Butterfield Company to Butterfield Lumber Company was introduced and read in evidence, which was in the following words and figures, towit:

In consideration of the sum of three hundred eighty seven dollars and fifty cents, cash in hand paid, the receipt of which is hereby acknowledged, we convey and warrant to Butterfield Lumber Company and Butterfield Company all the pine timber on the land as described — the S. W. ¼ of N. E. ¼ and S. E. ¼ of N. W. ¼ and W. ¼ of S. W. ¼ section thirty six (36) township five (5) range nine (9) east, situated in the county of Lincoln and State of Mississippi: we further convey and warrant in said company a right of way through and across said land for roads, trams or railroads one hundred (100) feet wide to be laid off at will and pleasure of said Nutterfield Company.

Witness our signatures the 1st day of September 1900.

NORWOOD — BUTTERFIELD CO.,
By C. S. BUTTERFIELD.

STATE OF MISSISSIPPI,
Lincoln County.

Personally appeared before me T. J. Hill justice of the peace of said county and State the within named Charles Butterfield an officer and stockholder of the Norwood and Butterfield Company, and duly authorized to make conveyance thereof, who acknowledged that he signed and delivered the foregoing instrument on the day and year therein mentioned.

Given under my hand this first day of September A. D. 1900.

T. J. GILL, J. P.

Filed for record Septem. 1st, 1900 at 10 o'clock a. m.

R. W. McNAIR.

ESAU HARNESS, a witness for the complainant testified as follows, viz: That he was at one time the owner of the land and timber thereon involved in this suit, having received a patent thereto from the United States Government in December A. D. 1892. That it was not his purpose to encumber the land or timber involved in the suit at the time he signed the deed in trust under which the defendant claims title to the land involved herein. That he could
12 not read, and if it was encumbered thereby or contained in said deed in trust it was without his knowledge and against his will. That before he signed *under* the deed in trust under which the defendant claims title to said land, he told the defendant that he had a contract to sell the timber on said land to Norwood & Butterfield Company. That he contracted to sell the timber on said land both before and after he received his patent thereto, and he so told the defendant F. H. Hartman. That he was paid in cash by Norwood & Butterfield Co. for said timber upon the day he conveyed the timber to Norwood & Butterfield Co. which was upon the date mentioned in the deed of conveyance. That he sold and conveyed the timber upon said land before he signed the deed in trust as is shown by the deed and deed in trust. That he never came to Brookhaven between the time he executed the deed to Norwood & Butterfield Co. and the execution of the deed in trust to Hartman. That he never saw or talked with Hartman during said interval. He never signed but one written instrument in favor of Norwood & Butterfield Co. He agreed to sell timber to it before and after he made final proof under homestead laws of the U. S. and made deed after making such final proof.

JAKE HARNESS, a witness for complainant, being duly sworn, testified as follows: That he and his brother Esau Harness, came to Brookhaven the latter part of the week. That at that time Esau Harness sold to Norwood — Butterfield Co. the timber on the land claimed by the defendant. But that they came to Brookhaven be-

fore the deed in trust, under which defendant claims title to the land, had been executed by Esau Harness. That in passing F. H. Hartman's store they met F. H. Hartman, who said "Well Esau, I suppose you have sold the timber on your land to Norwood & Butterfield Co." and Esau replied: "Yes." Then Hartman said "You are the biggest fool I ever saw, you could have lain flat on your back and played with your fingers and toes and made more money than that." He testified that he, Jake Harness was present a few days afterward when Mr. Lanier and Justice of the Peace
13 Joel Finch were at Harness' place where he signed the deed in trust under which defendant claims title.

W. C. Coon, a witness for the complainant, being duly sworn, testified as follows: That he was engaged during the years 1892 and 1893 buying timber for the Keystone Lumber Co. That during this time he learned that Norwood & Butterfield Co. had a contract with Esau Harness to buy the timber situated upon the land now claimed by the defendant. That he told the defendant F. H. Hartman that Norwood — Butterfield Co. had a contract with Esau Harness to buy said timber. That he was then employed by F. H. Hartman to assist the defendant in defeating the execution of the sale of the timber to Norwood & Butterfield Co. under the contract with Esau Harness. That the defendant planned to accomplish this in the following way: That he was to assist Hartman in securing a deed in trust upon said land before Norwood & Butterfield Co. could secure a deed to the timber on said land under the contract with Esau Harness. It was his, Coon's, defined duty to ascertain when Esau Harness made final proof of his homestead entry and secured his final certificate of title to said land. As soon as this information was obtained he was to convey it immediately to defendant, F. H. Hartman, and then use his influence in perfecting the defendant's scheme. Coon likewise testified that in carrying out these plans he interviewed Esau Harness and notified Hartman that Harness had made his final proof to the land. In regard to the contract between Norwood & Butterfield Co. and Esau Harness, Coon testified that his understanding of the contract was that Norwood & Butterfield Co. were to furnish Esau Harness money to commute his homestead at $1.25 per acre, for which sum Harness was to sell the timber on his land to Norwood & Butterfield Co. That the only contract of which he had knowledge was the one made by the Norwood & Butterfield Co. with Esau Harness for the sale of the timber, while title to the land and timber was in the U. S. Government and before final proof of settlement and cultivation had been made by Esau Harness as required by law. He did not
14 know whether this was a parol or written contract. His understanding at that time was that it was written but afterwards that it was a verbal contract.

(Here the complainant rested.)

The defendant F. H. Hartman here introduced a deed in trust which was filed for record Jan. 31st 1893.

THE STATE OF MISSISSIPPI, }
Lincoln County. }

This deed in trust made this 30th day of January A. D. 1893, witnesseth: That whereas Abram Harness and his wife Saling Harness and Esau Harness and his wife Louie Harness and Levy Stovall and his wife Jane Stovall, parties of the first part, are indebted to F. H. Hartman in the sum of four hundred and forty-four dollars on a promissory note dated the 30th day of January 1893, bearing ten per cent. interest from maturity and whereas said parties of the first part in addition to said note expects said F. H. Hartman to advance us money and sell us supplies and merchandise during the year 1893 to the extent as he may deem safe and judicious at ten per cent. of *suit* at such prices as may be agreed upon at the time of delivery or at the usual and customary credit prices in the town of Brookhaven Mississippi, and whereas said parties of the first part have agreed to secure the payments of said note and indebtedness to be contracted, and also any further amounts that may be advanced as aforesaid and not mentioned herein; that parties of the first part, in consideration of the premises as well as ten dollars to us paid by W. F. Parsons, trustee, do hereby bargain, sell and convey to the trustee the following described property, situated in Lincoln county, Mississippi, viz: Our entire interest in any land and all crops of cotton, corn and other agricultural products raised by us and any hand we may employ during the year 1893 on land belonging to ourselves or any other land we may cultivate during said year; also any and all cotton and corn that may be due said parties of the first part as rent for said year 1893; and also S. W. ¼ of section 25, township 5 range 9 east, S. W. ¼ of N. E. ¼ and S. E. ¼ of N. W. ¼ and W. ½ of S. E. ¼ of section 36, township 5, range 9 east, N. E. ¼ of S. E. ¼ section 35, township 5, range 9, S. W. ¼ of N. E. ¼ and N. W. ¼ of S. E. ¼ and S. E. ¼ of N. W. ¼ section 35, township 5, range 9, and

One bay horse 9 years old named Frank,
" yoke of oxen 7 years old, both red,
Four yearlings,
One black horse 10 years old,
" *one* sorrel colt, 3 years old,
" bay horse very old,
" bay horse 5 years old, one wagon.

And any increase of property, real or personal, that may hereafter be acquired by purchase or otherwise, the title to which unto said trustee, or any successor, we warrant and agree forever to defend. In trust however that if the said parties of the first part shall on or before the first day of October 1893, pay all that may be due said F. H. Hartman on said note and all debts contracted for

money advanced and for supplies and merchandise sold and delivered as aforesaid, and all costs and commissions incurred and interest accrued on account of said deed in trust, then this deed in trust to be void; but if default is made in said payment or any part thereof, the trustee shall take possession of said property, and having given ten days' notice of the time, place and terms of sale by posting written notices in three public places in said Lincoln county, sell said property or a sufficiency thereof to make said payments, for cash at public auction at the court house door of Lincoln county. And said F. H. Hartman or his legal representatives can at any time he may desire, appoint a trustee in the place of W. F. Parsons, or any succeeding trustee. And should the trustee at any time believe said property or any part thereof endangered as a security for said payment, he shall take the same into his possession and hold until said payments are made or till said property is sold as aforesaid, but until taken by the trustee for either of the purposes aforesaid, said parties of the first part can hold the same, but no demand for the property or for the payment shall be necessary to entitle the trustee to possession for the purposes aforesaid. It is further distinctly
16 understood and agreed between the parties aforesaid that this deed is made and intended to secure any advances during the year 1893 made after the 1st day of October 1893, and advances so made after the 1st day of October 1893, shall be due and payable as soon as made, and that the prices charged in account for goods, supplies and merchandise sold, so far as the same had been agreed upon by and between the parties at the time of sale, shall be deemed to be held fair and reasonable, and if no such prices have been agreed upon, that the credit market price prevalent at the time of sale and delivery may be charged and collected under this deed in trust.

ABRAM x HARNESS.
SALINA x HARNESS.
EASU x HARNESS.
LONIE x HARNESS.
LEVY x STOVALL.
JANE STOVALL.

R. LANIER.
JOEL FINCH.

THE STATE OF MISSISSIPPI, }
Lincoln County. }

Personally appeared before me the undersigned justice of the peace in and for the county and State aforesaid, the within Abram Harness, Easu Harness, Levy Stovall, Salina Harness, Lonie Harness and Jane Stovall, who ackowledged that they signed, sealed and delivered the foregoing deed in trust at the time herein named as their act and deed.

Witness my hand and seal of office this 31st day of January A. D. 1893.

JOEL FINCH, J. P.

Filed for record this 31st day of January A. D. 1893 at 2:15 o'clock p. m. and recorded this 31st day of Jan'y 1893 Book 20 page 385.

FELIX MAY, Clerk.

Refiled for record April 26 1894 at 10:25 o'clock a. m.

FELIX MAY, Clerk.

17 A trustee's deed was next offered and read in evidence from W. F. Parsons, trustee, to F. H. Hartman, towit:

STATE OF MISSISSIPPI, }
Lincoln County. }

Know all men by these presents: That I, W. F. Parsons, trustee, according to conditions and requirements of a certain deed in trust duly recorded in Book 20, page 385 of the old record books, and after the destruction of the records by fire were recorded in Book # 2, folio # 330 of the records of the county and State aforesaid, and made by Abram Harness, Salina Harness, Esau Harness, Lonie Harness, Levy Stovall and Jane Stovall to F. H. Hartman, all of the county and State aforesaid, have this day sold for $325.00, three hundred and twenty-five dollars, and hereby convey and deliver to F. H. Hartman as the highest bidder, the following tract of land situated in the county and State aforesaid, and particularly described in said deed in trust as the S. W. ¼ of N. E. ¼ of sec. 26, township 5, range 9 east, S. W. ¼ of N. E. ¼ and S. E. ¼ of N. W. ¼ and W. ½ of S. E. ¼ of sec. 36, township 5, range 9 east, S. W. ¼ of N. E. ¼ and N. W. ¼ of S. E. ¼ and S. E. ¼ of N. W. ¼ sec. 35, township 5, range 9, the said F. H. Hartman, his heirs and assigns to have and to hold forever. I only convey such title as is in me vested as trustee.

Witness my signature this the 14th day of December, 1894.

W. F. PARSONS.

STATE OF MISSISSIPPI, }
Lincoln County. }

This day personally appeared before me the undersigned chancery clerk in and for said county and State, W. F. Parsons (trustee) who acknowledged that he signed and delivered the foregoing deed at the time mentioned herein as his act and deed.

Witness my signature this the 14th day of December 1894.

FELIX MAY, Cl'k.

Filed for record Dec. 17th 1894, at 5:10 o'clock p. m.

FELIX MAY, Clerk.

Mrs. LILLIE FRIOU was next introduced as a witness for the defendant, who testified that the deed in trust introduced in evidence was in her handwriting, and that the wrote the signature of
18 all the parties to the deed in trust in the defendant's office, and the instrument is unaltered. Parties, she thought, signed in her presence in Hartman's office.

R. D. LANIER, a witness for the defendant, testified that he carried the unsigned deed in trust from Brookhaven about nineteen moles to the residence of Abram Harness. He left Brookhaven upon Monday afternoon, Jan. 30th, 1893, and remained over night with Justice of the Peace Joel Finch. That on the morning of the 31st, he and Joel Finch went to the residence of Abram Harness where Esau Harness signed and acknowledged the deed in trust by making his mark, said deed in trust having been read over to the signers before signing. That he returned yo Brookhaven upon that date, filed the deed in trust for record.

F. H. HARTMAN next testified that he had no knowledge of the sale of said timber to Norwood & Butterfield Co. That he had no conversation with Jake Harness in which either of them told him of such a sale. That he did not employ Coon to assist him in securing a deed in trust and that Coon did not tell him of any contract between Norwood & Butterfield Co. and Esau Harness to sell the timber upon said land. That he had no notice of any kind of sale of said timber before he secured a deed in trust, and that the deed in trust was to secure the payment of a valid debt due him by Esau Harness and others. That he was at that time and had been for some time previous thereto a merchant in Brookhaven. That Abram Harness, colored, the father of Esau Harness, and the father in law of Levy Stovall, had traded with him on a credit for a number of years. That Esau Harness and Levi Stovall traded with him in connection with Abram the year previous to the taking of the deed in trust in question. That they all expected joint papers, but their accounts were kept separately and all of them fell behind at the end of the year, owing larger balances than he desired. He regarded their trade as unsatisfactory and thought of foreclosing. He did not desire to carry the old debt another year and furnish them supplies, and told them so. That he had the matter under consideration for quite a while, when at last they came to his store in
19 Brookhaven with Toney Wallace. Esau explained that he had "proved out" his homestead entry and exhibited his final receipt, and offered to give deed in trust on his homestead entry land as additional secufiry if he would carry their old debt another year and advance them supplies. That he then agreed to extend the time of payment and advance them supplies etc. That the new deed in trust and deed were drawn up that day in his office. That their wives were not in town and it was necessary to have their signatures. To get the deed in trust signed by them he had Mr. Lanier, one of his clerks, to go to their homes as stated by Mr. Lanier. That he advanced and sold to them on that day some goods on a credit and continued to advance them under his contract during the year. That he did not know that the timber had been sold and they did not tell him anything about it. Had he known that the land was encumbered by timber deed in favor of complainant with an unlimited time for removal he would not have

extended the time for payment nor advanced them additional supplies, his understanding being that the land was principally valuable for the timber, and that the cleared and improved land consisted of only a small quantity, some ten or fifteen acres.

JOEL FINCH, a witness for defendant, being introduced and sworn, testified as follows: His testimony and that of Mr. Lanier in reference to the signing and delivery of the note and deed in trust at the house of Abram Harness was substantially the same.

TONY WALLACE, a witness for the defendant, being duly sworn, testified: That Esau Harness, Abram Harness and Levi Stovall saw him some time in February or March 1893 and stated to him that they were having trouble with their merchant, Mr. Hartman. That he was not disposed to furnish them that year and was talking about foreclosing the deed in trust held by him on forty acres of land and some personal property. They requested him to go to Brookhaven with them and intercede for them with Mr. Hartman. That they all cam- to town and saw Mr. Hartman at his store, and they discussed the matter, and his understanding was that everything was satisfactorily arranged. Mr. Hartman and the other parties went into the office where he supposed the necessary papers were drawn and prepared.

The defendant introduced the form of questions and answers required to be used in taking the testimony of homestead claimants on making final proof, and the laws and form of general affidavit required by the laws of the United States of said homestead claimants. These are the forms now in use.

4–369.

Homestead Proof—Testimony of Claimant.

—— —— being called as a witness in his own behalf in support of homestead entry No. — for —— testifies as follows:

Ques. 1. What is your name, age and post office address?

Ans. ——.

Ques. 2. Are you a native born citizen of the United States, and if so, in what State or Territory were you born?

Ans. ——.

Ques. 3. Are you the identical person who made homestead entry No. — at —— land office on the — day of —— 18— and what is the true description of the land claimed by you?

Ans. ——.

Ques. 4. When was your house built on the land and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof)

Ans. ——.

Ques. 5. Of whom does your family consist, and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried state the fact.)

Ans. ——.

Ques. 6. For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?

21 Ans. ——.

Ques. 7. How much of the land have you cultivated each season and for how many seasons have you raised crops thereon?

Ans. ——.

Ques. 8. Is your present claim within the limits of an indorporated town or selected site of a city or town, or used in any way for trade or business?

Ans. ——.

Ques. 9. What is the character of the land? Is it timber, mountainous, pra-rie, grazing, or ordinary agricultural land? State its kind and quality and for what purpose it is most valuable.

Ans. ——.

Ques. 10. Are there any indications of coal, salines, or minerals of any kind on the land? (If so describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. ——.

Ques. 11. Have you ever made any other homestead entry? (If so describe the same.)

Ans. ——.

Ques. 12. Have you sold, conveyed or mortgaged any portion of the land; and if so to whom and for what purpose?

Ans. ——.

Ques. 13. Have you any personal property of any kind wlsewhere than on this claim? (If so describe the same and where the same is kept.)

Ans. ——.

Ques. 14. Describe by legal subdivisions or by number, kind of entry, and office where made, any other entry or filing (not mineral) made by you since August the 30th 1890.

Ans. ——.

—— ——.

(Sign plainly with full Christian name.)

I hereby certify that the foregoing testimony was read to the claimant before being subscribed, and was sworn to before me this — day of —— 190– at my office at —— in —— county.

—— ——.

22 Final Affidavit Required of Homestead Claimants.

Section — of the Revised Statutes of the United States.

I —— —— having made homestead entry of the — section No. — in township No. — of range No. — subject to entry at —— under section No. 2289 of the Revised Statutes of the United States, and for that purpose do solemnly — that I — a citizen of the United States, that I have made actual settlement upon and cultivated and resided upon said land since the — day of —— 18— to the present time; that no part of said land has been alienated, except as provided in section 2288 of the Revised Statutes but that I am the sole *bona fide* owner as an actual settler; that I will bear true allegiance to the Government of the United States; and further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States, except —.

—— ——.

(Sign plainly with full Christian name.)

I —— —— of —— do hereby certify that the above affidavit was subscribed before me this — day of —— 190–, at my office at —— in —— county ——.

—— ——.

23 These forms are furnished by the U. S. land office to chancery clerks to be used in taking final proofs as shown by the testimony of R. W. McNair, chancery clerk of Lincoln county. Witness could not state whether these were the same forms in use in 1893. Complainant objected to the introduction of said forms.

ESAU HARNESS, being recalled by the defendant, testified that when he testified before the chancery clerk of Lincoln county in proving out his homestead entry, the following questions *were* propounded to him, to wit. "Have you sold, conveyed or mortgaged any portion of the land, and if so to whom and for what purpose?" To which he answered: "No, I have not." The complainant objected to this testimony.

C. S. BUTTERFIELD was introduced by the defendant but his testimony was on a matter not deemed by counsel to be material and by agreement his testimony is omitted.

It is also agreed by counsel that the calandar for the year 1893 showed that January 28th was Saturday.

And this was all the evidence in the case.

Whereupon the court made upon the — day of February A. D. 1902, the following decree therein, namely:

BUTTERFIELD LUMBER CO.
vs.
F. H. HARTMAN. } 1632. Final Decree.

This cause coming on for fonal hearing on the bill of complaint, answer and proofs, oral and documentary, the witnesses being examined orally in open court by agreement, and the court having heard and considered the pleading and the evidence, and being of opinion that the complainant is not entitled to the relief sought by the bill, it is ordered and decreed that the said bill be and the same is hereby dismissed, and that the complainant pay all the cost of this suit for which execution may issue.

The complainant on request is allowed sixty days in which to prepare and present a bill of exceptions.

24 Adjudged and decreed this the 20th day of February, A. D. 1902.

To which decree and the action of the court in making the same, complainant then and there excepted, and its exceptions were allowed. Complainant was then and there allowed sixty days in which to present to the chancellor its bill of exceptions for his signature, making it part of the record in this cause. Said bill of exceptions was duly presented and signed by the chancellor and made a part of the record therein upon the 4th day of April A. D. 1902.

H. C. CONN, Chancellor.

The above and foregoing bill of exceptions is agreed by us to be correct, and the same may be filed as a part of the record in this cause.

T. BRADY,
Att'y for Complainant.
P. Z. JONES,
Att'y for Defendant.

March 28th 1902.

25 Appeal Bond.

Filed Sept. 26, 1902. R. W. McNair, Clerk.

THE STATE OF MISSISSIPPI,
Lincoln County. }

Know all men by these presents: That we, the Butterfield Lumber Company, principal, and O. Newton, Jr. and W. D. Davis as sureties, are held and firmly bound unto F. H. Hartman in the sum of five hundred dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our hands this the 26th day of September A. D. 1902.

The condition of the above obligation is such that whereas on the 20th day of February 1902, a decree was rendered by the chancery court of Lincoln county, State aforesaid, in favor of said F. H. Hartman for the sum of five hundred dollars ($500.00) besides costs of suit, wherein the said —— —— has prayed for and obtained an appeal, operating as a supersedias, returnable to the next term of the supreme court of the State aforesaid.

Now if the said Butterfield Lumber Company shall prosecute its said appeal with effect, and shall well and truly pay and satisfy the judgment, damages and costs in case said decree shall be affirmed, and shall also perform the sentence, judgment or decree the supreme court shall award in the premises, then the obligation to be void, otherwise to remain in full force and virtue.

BUTTERFIELD LUMBER CO.,
By C. S. BUTTERFIELD, V. Pres.
O. NEWTON, JR.
W. D. DAVIS.

Endorsed on Back.

STATE OF MISSISSIPPI, }
Lincoln County. }

This day personally appeared before the undersigned R. W. McNair, chancery clerk in and for said county, the within named C. S. Butterfield, vice president of Butterfield Lumber Co., as principal and O. Newton Jr. and W. D. Davis, sureties on the *the* foregoing bond, who after being duly sworn according to law, depose and say that they are worth the sum set opposite their names in property situated in said State over and above their just debts and legal liabilities and over and above all property exempt by law from execution. The said O. Newton in the sum of $250; the said W. E. Davis in the sum of $250.

O. NEWTON, JR.
W. D. DAVIS.

Sworn to and subscribed before me this 27 day of Sept. 1902.
R. W. McNAIR, Clerk.

26 Citation to Supreme Court.

THE STATE OF MISSISSIPPI, }
Lincoln County. }

To the sheriff of said county, Greeting:

Whereas on the 20th day of February A. D. 1902 by a decree of our chancery court of the county of Lincoln in the State aforesaid, F. H. Hartman recovered a judgment against Butterfield Lumber

Co. for the ownership of certain lands mentioned in his bill, besides the costs of suit; and the said Butterfield Lumber Co., having prayed and obtained an appeal to our supreme court at Jackson, in said State, on the 3rd Monday of April 1903 next, and having given bond for supersedias:

We command you to cite the said F. H. Hartman, or P. Z. Jones, his attorney of record, to appear then and there, in and before said supreme court to defend the said appeal, and have then and there this precept before our said supreme court.

Witness the Honorable A. H. Whitfield, chief justice of our said supreme court, the 3rd Monday of April A. D. 1903.

Witness also R. W. McNair, clerk of our said chancery court and the seal of his court affixed the 30th day of March A. D. 1903.

[SEAL.] R. W. McNAIR, Clerk.

Endorsed on Back.

I have this day executed the within writ personally on the within named defendant F. H. Hartman by delivering to him a true copy of this writ. April 1st, 1903.

R. R. APPLEWHITE, Sh'ff,
By WM. H. FURR, D. S.

Returned and filed April 1st, 1903.

R. W. McNAIR, Clerk.

27 Chancery Clerk's Certificate.

THE STATE OF MISSISSIPPI, }
Lincoln County. }

I, R. W. McNair, clerk of the chancery court in and for the county and State aforesaid, do hereby certify that the foregoing pages contain a true and correct transcript of case No. 1632, The Butterfield Lumber Co. vs. F. H. Hartman, as fully as the same appears of record in my office.

Witness my hand ans seal this 30th day of March 1903.

R. W. McNAIR, Clerk.

27½ Assignment of Errors.

STATE OF MISSISSIPPI:

In the Supreme Court.

BUTTERFIELD LUMBER COMPANY
vs.
F. H. HARTMAN ET AL.

Assignment of Errors.

Now comes the appellant by attorney and for error in the court below assigns the following causes.

The court erred in denying the appellant the relief sought in its bill of complaint.

The court erred in rendering a decree denying the relief sought and in dismissing the appellant's bill.

Respectfully submitted.

T. BRADY, JR.,
Solicitor for Appellant.

Endorsed on back: Filed April 2, 1903. E. W. Brown, clerk, by W. J. Brown, Jr. D. C.

28 Opinion.

BUTTERFIELD LUMBER CO.
vs.
F. H. HARTMAN.

CALHOON, *J.*:

We are driven to the conclusion that the decree of the court below must have been the result of an opinion that the agreement between Esau Harness and the grantor of appellant that, in consideration of the advance money to perfect his homestead entry and get his patent, Esau would sell the timber on the land in controversy, was against public policy and void, and made void also the subsequent sale of the timber to reimburse for that advance. We are not in accord with that view. Rev. St. U. S. sections 2290, 2291, 2296 (U. S. Comp. St. 1901, pp. 1389, 1390, 1398), with Gould & Tucker's notes, vol. 1, p. 537. On the testimony we can not escape the conviction that the appellee had such notice as should put any reasonable man on inquiry, which would have disclosed the existence of the conveyance of the timber and right of way by Esau to the grantor of appellants.

Reversed, and decree here in accordance with the prayer of the bill.

28½ March Term, A. D. 1903, Monday, May 4th, A. D. 1903.

Minute Book "L," p. 624.

BUTTERFIELD LUMBER CO. v. F. H. HARTMAN. } 10881. Decree.

This cause having been submitted on a former day of this term on the record herein from the chancery court of Lincoln county, and this court having sufficiently examined and considered the same and being of opinion that there is error therein, doth order, adjudge and decree that the final decree of said chancery court rendered in this cause on the 4th day of April A. D. 1902, be and the same is hereby reversed, and this court proceeding now to enter such decree as should have been entered in the court below, doth order adjudge and decree that the trustee's deed to F. H. Hartman in so far as it conveys the pine timber on the said land in this bill mentioned and said strip of land one hundred feet wide to be used as a right of way across said land, be and the same is hereby cancelled and held for naught, and said defendants have no title to said timber and right of way, but the title thereto be and the same is hereby decreed to be vested in appellants.

It is further ordered, adjudged and decreed that appellee do pay the costs of this cause in this court and the court below to be taxed etc.

29 STATE OF MISSISSIPPI, Supreme Court. }

I, Geo. C. Myers, clerk of said court in and for said State, hereby certify that the foregoing pages contain a true and correct copy of the record in the case of Butterfield Lumber Company vs. F. H. Hartman, No. 10881 on the docket of said court, as the same appears on file and of record in my office.

Witness my hand and the seal of this court, this the — day of April, A. D. 1904.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Supreme Court Clerk.

30 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Mississippi, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before

you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Butterfield Lumber Company, appellant, and F. H. Hartman, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or
31 statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellee as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the ninth day of May, in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

EDWARD D. WHITE,
Associate Justice of the Supreme Court
of the United States.

32 UNITED STATES OF AMERICA, ss:

To Butterfield Lumber Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Mississippi, wherein F. H. Hartman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the

said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this ninth day of May, in the year of our Lord one thousand nine hundred and four.

EDWARD D. WHITE,
Associate Justice of the Supreme Court
of the United States.

32½ On this 16th day of May, in the year of our Lord one thousand nine hundred and four I, Thomas Brady Jr. the attorney of record for Butterfield Lumber Company hereby acknowledge receipt of a copy of the within citation and accept the same as service of this writ, hereby waiving service by an officer—it being understood and agreed by the parties that in case brief is not on file by the return day of the writ no advantage shall be taken of such fact by the plaintiff in error.

T. BRADY, JR.,
Attorney of Record for the Butterfield Lumber Company.
T. BRADY.

33 Know all men by these presents, that we, F. H. Hartman as principal and F. F. Becker and L. H. Baggett as sureties, are held and firmly bound unto Butterfield Lumber Company in the full and just sum of five hundred dollars, to be paid to the said Butterfield Lumber Company, its certain attorney, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of May, in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a supreme court of the State of Mississippi, in a suit pending in said court, between Butterfield Lumber Company, appellant, and F. H. Hartman, appellee, a decree was rendered against the said F. H. Hartman, and the said F. H. Hartman having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Butterfield Lumber Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said F. H. Hartman shall prosecute said writ to effect and answer

all damages and costs if he fail to make his plea good, then the above obligation to be void: else to remain in full force and virtue.

F. H. HARTMAN. [SEAL.]
F. F. BECKER. [SEAL.]
L. H. BAGGETT. [SEAL.]

Sealed and delivered in the presence of—

P. Z. JONES.
GEO. WILLIAMSON.
TYNES TULL.

Approved by—

EDWARD D. WHITE,
Associate Justice of the Supreme Court
of the United States.

Certificate of Clerk as to Sureties.

I, L. B. Mosely, clerk of the circuit court of the United States for the southern district of Mississippi, do hereby certify that F. F. Becker and L. H. Baggett, whose names appear on the within bond, are amply sufficient sureties on said bond for the sum of five hundred dollars, and that their post-office address is Brookhaven, Mississippi.

Witness my hand and the seal of said court hereto [SEAL.] affixed at Jackson, in said district, this 5th day of May, A. D. 1904.

L. B. MOSELY, Clerk.

STATE OF MISSISSIPPI, }
Hinds County. }

I, Geo. C. Myers clerk of the supreme court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of the appeal bond in the case of F. H. Hartman vs. Butterfield Lumber Company, appealed on writ of error, to the Supreme Court of the United States; that original is now on file in my office.

Given under my hand, with the seal of said court, at office affixed, in the city of Jackson, Miss., this 18th day of May A. D. 1904.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk Supreme Court of Mississippi.

35 THE STATE OF MISSISSIPPI,
Lincoln County.

To the Hon. E. D. White, justice of the Supreme Court of the United States:

The petition of F. H. Hartman, a citizen of Lincoln county, Mississippi, would very respectfully represent and state that on the 26th day of August, A. D. 1901, the Butterfield Lumber Company, a corporation existing under the laws of the State of Mississippi, having its domicile and place of business in Lincoln county, Mississippi, filed its bill of complaint in the chancery court of said Lincoln county against your petitioner, the said F. H. Hartman, to have his deed to certain lands, to wit: S. W. ¼ of N. E. ¼, and S. E. ¼ of N. W. ¼ and W. ½ of S. E. ¼ sec. 36, township 5, range 9 east, in so far as it affects the pine timber growing thereon canceled because it casts a doubt, cloud or suspicion on the title of the said Butterfield Lumber Company, and to have its title to the timber confirmed and quieted.

The bill alleged that one Esau Harness received a patent to the land from the Government of the United States during the year 1893. That prior to the 28th day of February, 1893, for a valuable consideration Esau Harness entered into a contract to sell the pine timber growing on the said land and a right of way for a railroad 100 feet wide to Norwood & Butterfield Co., and on said date in fulfillment of said contract he sold and conveyed by warranty deed to Norwood & Butterfield Co. said timber and right of way and
36 that Norwood & Butterfield Co. conveyed the same to the Butterfield Lumber Co.

The bill further alleges that on January 30th, 1893, Esau Harness and his wife executed a deed in trust in favor of F. H. Hartman, your petitioner, by which they conveyed said land to W. F. Parsons, as trustee. That on Dec. 14, 1894, the said trustee sold the land at public sale and F. H. Hartman became the purchaser.

That the vendor of the Butterfield Lbr. Co. had a contract to purchase said timber and right of way and in pursuance thereof did purchase it before it was sold to your petitioner. But complainant's vendor's deed was not recorded until after the deed in trust was executed and delivered to your petitioner, and that petitioner contended that complainant had no title to said timber and right of way because the deed in trust to your petitioner was recorded before the timber deed to Norwood & Butterfield Co.

It is also alleged and charged by the bill that your said petitioner had actual notice of the contract between Esau Harness and Norwood & Butterfield Co., and also that your petitioner had actual notice and knowledge of the sale of said timber and right of way to Norwood & Butterfield Co. before he secured the deed in trust; that after such knowledge he secured said deed in trust and hurried it upon record to defeat complainant's rights. That your petitioner is not the rightful owner of said timber conveyed to the complainant's

vendor, and that the deed in trust and trustee's deed thereunder cast a doubt, cloud or suspicion on the complainant's title.

37 Your petitioner answered the bill under oath denying that he had actual notice of either the contract of sale or of the sale and deed made in pursuance of such contract before and at the time he secured the deed in trust; he denied under oath that after such knowledge he secured said deed in trust and hurried it upon record to defeat the complainant's rights; he denied that he is not the rightful owner of said land and timber and that the deed in trust and trustee's deed cast any cloud, doubt, or suspicion on the complainant's title, and he denied that the complainant was the owner of said timber and land or any interest therein.

On the trial of the cause Esau Harness a witness for the complainant testified, which testimony is embodied in a bill of exceptions and made a part of the record in the said cause, that he contracted and agreed with *with* Norwood & Butterfield Co. to sell the timber before he made final proof under the homestead laws of the United States, and that the deed was made after such final proof. He also testified that when he testified before the chancery clerk of Lincoln county, Mississippi, in proving out his homestead entry the following question was propounded to him, to-wit: "Have you so sold, conveyed, or mortgaged any portion of the land; and if so, to whom and for what purpose?" to which he answered "No," I have not."

W. C. Coon, a witness for the complainant, whose testimony is also in the bill of exceptions and as such a part of the record, testified that he learned during the year 1892 or 1893 that Norwood & Butterfield Co. had a contract with Esau Harness to buy the timber

38 on the land; that his understanding of the contract was that Norwood & Butterfield Co. were to furnish Esau Harness money to commute his homestead entry at $1.25 per acre, in consideration of which Harness was to sell and convey the timber growing on the land to the said Norwood & Butterfield Co.; that the only contract of which he had any notice or knowledge was made while title to land and timber was still in the United States and before Esau Harness had made final proof of settlement, occupation and cultivation as required by the homestead laws.

As shown by the record there is other testimony on the question of notice, the testimony on this point being conflicting; but your petitioner deems the foregoing statement of the evidence sufficient for the consideration of the question here presented, namely; that the contract made by Esau Harness to sell the timber growing on the land before the making of his final proof was null and void as against the public policy of the laws and statutes of the United States; that The Norwood & Butterfield Co. being in fact the same concern as The Butterfield Lumber Co., the complainant, then the complainant is not in court with clean hands, the maxim, *ex turpi causa non oritur actio* applies, so that the court should not grant to the complainant any relief, but leave it where it finds it.

Your petitioner avers and charges that Norwood & Butterfield Co. is virtually one and the same concern with the Butterfield Lumber Company the only change in fact being in the name of the concern, and the Butterfield Lumber Co. stands exactly in the shoes of its grantor; he avers that the contract made before Esau Harness had perfected his homestead entry and while the land was still the
39 property of the United States involved the commission and made it necessary for Esau Harness to commit the crime of perjury under the laws of the United States in order to carry out the terms of his said contract and that the complainant, or its grantor which is in reality the same concern, was a party to such crime equal in guilt with the said Esau Harness. That in making out its own case by its testimony in chief its own infamy was developed and exposed and a court of equity should have applied the homestead laws of the United States and have closed forever its portals to the entrance of such a party seeking relief at the bar of good conscience.

The lower court dismissed the bill and denied the complainant any relief sought thereby. On appeal to the supreme court of the State of Mississippi, at the March term, 1903, thereof, on the 4th day of May 1903, the decree of the chancery court of Lincoln county was reversed and a decree entered in favor of the complainant in accordance with the prayer of the bill by the supreme court aforesaid. In deciding the casue, the court speaking through Associate Justice Calhoon, delivered the following opinion, to-wit:

"BUTTERFIELD LUMBER CO.
v. } 10881.
F. H. HARTMAN.

CALHOON, J.:

"We are driven to the conclusion that the decree of the court below must have been the result of an opinion that the agreement between Esau Harness and the grantor of appellant that, in consideration of the advance money to perfect his homestead entry and get his patent, Esau would sell the timber on the land in controversy, was against public policy and void, and made void also the subsequent sale of the timber to reimburse for the advance. We are not in accord with that view. Rev. St. sections 2290-2291-2296 with Gould and Tucker's Notes, vol. I p. 537.

"On the testimony we can not escape the conviction that
40 the appellee had such notice as should put any reasonable man on inquiry—which would have disclosed the existence of the conveyance of the timber, and right of way, by Esau to the grantor of appellants.

"Reversed and descree here in accordance with the prayer of the bill."

Your petitioner charges and avers that in accordance with the foregoing opinion a decree has been and was entered on the minutes

of the supreme court of Mississippi and that the same is a final decree terminating the litigation between the parties in the State courts of Mississippi. That the decree is the decree of a State court, and not of a Territory, nor of the District of Columbia, and the said decree was rendered in a suit between the Butterfield Lumber Co. and your petitioner, the said F. H. Hartman; and it was rendered by the highest court of the State of Mississippi, no appeal lying from the supreme court of the State of Mississippi to any other court of the said State.

Your petitioner further avers that there appears in the record of this cause a Federal question which has been disposed of in the manner shown by the opinion of the supreme court of the State of Mississippi incorporated and referred to herein. That the said Federal question was an issue in the cause and its determination was necessary to the decision, and the decision of this question was necessary to the determination of this cause, and it was actually decided and the decree could not have been given without deciding it.

It appeared from the evidence which is made a part of the record by bill of exceptions that the contract relied on by the complainant was void under the homestead laws of the United States. Notwithstanding this fact a decree was entered against the defendant, your petitioner. This could not have been so without denying to
41 him the protection claimed under the homestead laws. The court plainly ruled that the defense that the contract was against public policy and void was not sustainable and that the homestead laws carry with them no protection against such a contract. As no decree could go against your petitioner without denying the protection asserted by him under the homestead laws and as the supreme court of the State of Mississippi expressly declared that this invalidity under the homestead laws was not sustainable, the case is one in which a right was specifically set up and claimed under the statutes of the United States, and the decision and decree of the State court were against such right.

Your petitioner is advised that the court erred in holding that the contract made by Esau Harness and Norwood & Butterfield Co. before the making of final proof was not void and against public policy under the laws of the United States, and he assigns as error such holding of the court, his assignment of errors being attached hereto and made part of this petition.

The premises considered he prays for the issuance of a writ of error to have the record in this cause removed from the supreme court of the State of Mississippi to the Supreme Court of the United States so that the cause may be reviewed.

He states and avers that the chief value of the land consists in the pine timber growing thereon, and that it is all well timbered except about ten or fifteen acres. The said Butterfield Lumber Co. is likely to cut and remove the said timber, and your peti-
42 tioner desires a supersedeas so that he may be secured against loss in case he should gain the suit in the Supreme Court of

the United States. The property involved, that is the timber on the land, is of the value of about $—.

If your petitioner has prayed for wrong, improper, or insufficient relief pray grant him such other relief, general or special, as the nature of the case may entitle him to receive. And as in duty bound he will ever pray.

F. H. HARTMAN, Petitioner,
By P. Z. JONES, His Solicitor.

THE STATE OF MISSISSIPPI,
Lincoln County.

Personally appeared before the undersigned notary public of the city of Brookhaven in said county and State the above named F. H. Hartman who being duly sworn says on oath that to the best of his knowledge and belief the facts stated in the foregoing petition are true and correct.

—— ——.

Sworn to and subscribed before me this — day of May, A. D. 1903.

—— ——,
Notary Public.

See July-August, 1901, Am. Law Review, vol. 35, page 536.
For assignment of errors see next page.

43 F. H. HARTMAN
v.
BUTTERFIELD LBR. CO.

Assignment of Errors.

The petitioner assigns as error the following:

1st. The court erred in holding that the contract between Esau Harness and Norwood & Butterfield Co. was an advance or loan of money to perfect Esau's homestead entry.

2nd. The court erred in holding that the contract between Esau Harness and Norwood & Butterfield Co. was not against public policy and void, and that the subsequent sale of the timber was not void.

3rd. The court erred in holding that the contract between Harness and Norwood & Butterfield Co. was valid, and in lending its aid to enforce a right growing out of a contract founded on perjury and entered into in defiance of a clearly expressed will of the Government.

4th. The court erred in holding that a contract whose consummation necessarily rests on perjury is not illegal.

P. Z. JONES,
Att'y for Hartman.

44 UNITED STATES OF AMERICA,
State of Mississippi.

Writ of Error to the Supreme Court of Mississippi.

In the Supreme Court United States.

F. H. HARTMAN, Plaintiff in Error,
vs.
BUTTERFIELD LUMBER Co., Defendant in Error.

Amended Assignment of Errors.

Now comes the plaintiff in error, by his attorney, and for error he assigns the following:

1. The court erred in the construction it placed on section- 2290–2291–2296 of the Revised Statutes of the United States.

2. The court erred in the construction it placed on the contract between Esau Harness and the Norwood and Butterfield Company which agreement should be construed with reference to the homestead laws of the United States.

3. The court erred in ruling that the defense that the contract was against public policy and void was not sustainable, and that the homestead laws of the United States carry with them no protection against such a contract.

P. Z. JONES,
Attorney for Plaintiff in Error.

Endorsed on cover: File No. 19,388. Mississippi supreme court. Term No. 288. F. H. Hartman, plaintiff in error, *vs.* Butterfield Lumber Company. Filed June 4th, 1904. File No. 19,388.

FILE COPY.

Office Supreme Court U. S.
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OCT 30 1905
JAMES H. McKENNEY,
Clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 44.

FRANK H. HARTMAN, PLAINTIFF IN ERROR,

vs.

BUTTERFIELD LUMBER CO., DEFENDANT IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF MISSISSIPPI.

BRIEF FOR THE PLAINTIFF IN ERROR.

P. Z. JONES, ATTORNEY.

IN THE SUPREME COURT OF THE UNITED STATES.

WRIT OF ERROR TO THE SUPREME COURT OF MISSISSIPPI.

FRANK H. HARTMAN, PLAINTIFF IN ERROR,

vs.

BUTTERFIELD LUMBER CO., DEFENDANT IN ERROR.

STATEMENT OF THE CASE FOR THE PLAINTIFF IN ERROR.

The following is a verbatim copy of the case as it is reported in the Mississippi State Reports, Volume 83rd, page 494 et seq.:

"Butterfield Lumber Company vs. Frank H. Hartman.* Public Lands. Revised Statutes of the United States, Sections 2290, 2291 and 2296. Contracts to sell timber. Public policy.

"An agreement by a homesteader who has entered public land from the United States with a third person, that in con-

*This case is approved in the following cases to be reported in 83 Miss., viz: Sanford v. Eastabuchie Lumber Co.; Anderson v. Wilder, and Orrell v. Bay Manufacturing Co. The subject is elaborated and the principle extended in the case last named.

sideration of the latter's advancing him money to complete the entry and obtain the patent, he would sell such person the timber on the land, is not against public policy, and the subsequent sale of the timber after the issuance of the patent in pursuance to the agreement is valid. Revised Statutes of the United States, Sections 2290, 2291 and 2296 considered.

"From the Chancery Court of Lincoln county.

"Hon. Henry C. Conn, Chancellor.

"The Butterfield Lumber Company, appellant, was complainant, and Hartman, appellee, was defendant in the court below.

"In November, 1892, Esau Harness received a patent from the United States government to a certain tract of land in Lincoln county as his homestead. Before entry was perfected, Harness entered into an agreement with the Norwood & Butterfield Company to sell it all the pine timber on the land, and also a right of way 100 feet wide over the same, and in pursuance of this agreement Harness and his wife, on January 28, 1893, after the issuance of the patent, executed a deed to Norwood & Butterfield Company conveying the pine timber on the land and a right of way, and this deed was filed for record February 10, 1893. In 1900 the Norwood & Butterfield Company conveyed the timber on said lands and the right of way to the Butterfield Lumber Company, appellant. On January 30, 1893, Esau Harness and his wife gave a deed of trust on the land to Hartman, appellee, and this deed of trust was recorded January 31, 1893. In December, 1894, the land was sold under this deed of trust, and was purchased by Hartman.

"Appellants filed a bill in the chancery court against Hartman, seeking to have the deed of trust to Hartman and the trustee's deed to him canceled in so far as it conveys the pine timber on the land and the strip of 100 feet for a right of way. The bill alleges that Hartman had actual notice of the contract between the Norwood & Butterfield Company and Esau Harness, and the deed conveying the pine timber and right of way.

On this last point, which was denied in defendant's answer, considerable testimony was taken, but it is not deemed necessary to set it out. On the final hearing the court below denied the relief sought and dismissed the bill, and the complainant, appellant, appealed to the Supreme Court.

"Thomas Brady, Jr., for appellant.

"The appellant's vendor in this case secured a deed to the pine timber, and a right of way across the land upon which it is situated. Two days later the appellee secured a deed of trust on the land, upon which the timber was situated. The next day he hurried it upon record, before appellant's timber deed had been filed for record, and now the appellee claims timber, right of way, and land under a trustee's deed.

"If appellee has title to the timber and right of way, it arises under the registry acts and not by reason of the intrinsic value of the deed of trust, or trustee's deed. The appellee was told before he secured his deed of trust upon this land by its owner, Esau Harness, and by witness Coon, that the timber thereon had been sold and conveyed to appellant's vendor.

"That appellee had sufficient knowledge to put him on inquiry and to lead to the requisite fact, is shown by him employing witness W. C. Coon to defeat the sale under the contract of which he had been advised.

"The appellee in this transaction coveted the appellant's timber, and with this spirit, like Jacob of old in displaying hairy hands, sought Esau's birthright.

"P. Z. Jones, for appellee.

"The contract made between Harness and Norwood & Butterfield Company was in violation of the homestead laws of the United States, and the appellants come into court with unclean hands. The pretended contract was made while the land was owned by the government of the United States. Norwood & Butterfield Company were to furnish the money and Harness was to do the swearing and the government was the victim.

"It is not pretended that Hartman was told any thing

about the timber deed, and if Hartman had followed out the informatiaon given him, as claimed, he would have ascertained not that a valid contract existed between Harness and Norwood & Butterfield Company, such as courts of law and equity would enforce, but that a conspiracy existed between them to defraud the government.

"The testimony for the complainant touching notice to Hartman is unsatisfactory and far from convincing. It is all denied by Hartman and he is fully corroborated by disinterested witnesses.

"The determination of this case in the lower court depended entirely on a question of fact.

"The inquiry here is not whether his finding was correct, but is manifestly wrong! Fox vs. Matthews, 83 Miss., 433; Derdeyn vs. Donovan 33 So. Rep. 652.

"Calhoon, J., delivered the opinion of the court.

"We are driven to the conclusion that the decree of the court below must have been the result of an opinion that the agreement between Esau Harness and the grantor of appellant that, in consideration of the advance money to perfect his homestead entry and get his patent, Esau would sell the timber on the land in controversy, was against public policy and void, and made void also the subsequent sale of the timber to reimburse for that advance. We are not in accord with that view. Rev. St. U. S. secs. 2290, 2291, 2296 (U. S. Comp. St. 1901, pp. 1389, 1390, 1398) with Gould & Tucker's notes, vol. 1, p. 537. On the testimony we can not escape the conviction that the appellee had such notice as should put any reasonable man on inquiry, which would have disclosed the existence of the conveyance of the timber and right of way by Esau to the grantor of appellants.

"Reversed, and decree here in accordance with the prayer of the bill."

Esau Harness, a witness for the defendant in error, testified that he agreed to sell the timber on the land before he made

final proof under the homestead laws of the United States. Record, page eight (8).

W. C. Coon, a witness for the defendant in error, testified that there was a contract between Esau Harness and Norwood & Butterfield Company by which Norwood & Butterfield Company were to furnish the money to Esau Harness with which to commute his homestead at $1.25 per acre, for which sum Harness was to convey to Norwood & Butterfield Company the timber growing on the land. That this contract and agreement was made while the title to land and timber was in the United States, and before final proof of settlement and cultivation had been made by Esau Harness as required by law. Record, page nine (9).

W. C. Coon testified further that he understood at first that this contract was in writing, but later it was verbal.

R. W. McNair testified that he is the clerk of the chancery court of Lincoln county, Mississippi, and identified the forms used and required to be used by the United States Land Office in making final proof by homestead claimants. Record, page fourteen, fifteen and sixteen, (14, 15 and 16).

The form of questions and answers used in the taking of testimony of homestead claimants in making final proof was introduced in evidence. Record, page fourteen (14), fifteen (15), and sixteen (16).

Esau Harness, a witness for the defendant in error, on being recalled, testified that when he gave his evidence before the chancery clerk of Lincoln county in proving out his homestead entry the following question was propounded to him, to-wit: "Have you sold, conveyed or mortgaged any portion of the land; and if so, to whom and for what purpose?" to which he answered "No, I have not." Record, page —.

SPECIFICATION OF ERRORS.

1. The court erred in holding that this was an advance of money under the facts stated to perfect a homestead entry.

2. The court erred in holding that the contract for the sale of the timber on the land before making of final proof was not against public policy and void.

3. The court erred in reversing the case and giving the defendant in error a decree for the timber.

4. The court erred in not affirming the decree of the lower court.

5. The court misinterpreted and misconstrued secs. 2290, 2291 and 2296 Rev. St. U. S.

ARGUMENT FOR PLAINTIFF IN ERROR.

We content ourselves with quoting at length the opinion of Mr. Justice Brewer in the case of Anderson vs. Carkins, 135 U. S. 483; 34 Law. ed., 272, in opposition to the Supreme Court of Mississippi, and shall have but very little if any thing to say in addition to what is said in that opinion, which follows:

"On December 16, 1876, the parties hereto entered into the following contract:

"This agreement made and entered into this 16th day of December, by and between Joseph Anderson and Hannah Anderson, his wife, of the county of Adams and State of Nebraska, parties of the first part, and Levi Carkins, of Adams county, Nebraska, party of the second part, witnesseth:

"That the said parties of the first part have this day sold for and in consideration of one hundred dollars to them in hand paid by the said Levi Carkins, the receipt whereof is hereby acknowledged, the following real estate, to-wit: The south one half of southeast quarter of section ten (10), in township eight (8), range ten (10), west, in Adams county, Nebraska.

"And the parties of the first part further agree with the party of the second part that they will make and execute to him on or before the 1st day of May, 1881, a good and sufficient warranty deed of said premises clear of all incumbrances, and for the faithful performance of this contract they hereby

bind themselves, their heirs, executors, administrators and assigns.

"In witness whereof they have hereunto set their hands and seals, this 16th day of December, 1876.

(Signed) JOSEPH ANDERSON,
HANNAH M. ANDERSON,
Parties of the First Part.

LEVI CARKINS, Party of the Second Part.

In presence of L. P. Hawley.

"In October, 1885, the defendant in error commenced his action in the District Court of Adams county, Nebraska, for a specific performance of this contract. The plaintiffs in error answered, pleading distinctly that the contract was against public policy and void, for the reason that at the time of its execution the land belonged to the general government; that it was made in contemplation of Joseph Anderson's taking the land as a homestead; that on the 7th day of March, 1877, he did enter the land as a homestead; and that he continued to reside upon and cultivate it until the 31st day of March, 1884, at which time he made final proof under the homestead law, and thus only obtained title. The case, after trial in the District Court, passed to the Supreme Court of the State, by which a final decree was entered for a specific performance. To reverse such decree this proceeding in error has been brought. Two questions are presented, one of jurisdiction, the other of error.

"First, with respect to jurisdiction: It will be observed that the contract is prima facie good. The land is described, the consideration stated and its receipt acknowledged, a sale affirmed, an agreement to convey recited and the time for the conveyance specifically named. To a bill for the specific performance of this contract the defendants answered that the contract was void under the homestead laws of the United States. Notwithstanding this defense, so expressly stated, a decree for specific performance was entered against them. Obviously this could not be so entered without adjudging such

defense insufficient and denying to them the protection claimed under the homestead laws. It is true that the Supreme Court of Nebraska, in its opinion, relied principally on two sections of the Statutes of Nebraska; but it also, and as plainly, ruled that the defense that the contract was against public policy and void was not sustainable, and that the homestead laws carry with them no protection against such contract. If under their provisions such a contract is void, then obviously no State statute can vitalize the contract, or deprive the party thereto of the protection afforded by the Federal statute. Inasmuch, therefore, as no decree could pass against the defendants without denying the protection asserted by them under the homestead laws, and as the Supreme Court of Nebraska expressly declared that this invalidity under the homestead laws was not sustainable, it follows that the case is one in which a right was specifically set up and claimed under the Statutes of the United States, and the decision and judgment of the State court were against that right. Hence the jurisdiction of this court can not be doubted.

Murdock vs. Memphis, 87 U. S. 20 Wall. 590 (22:429).

"It is immaterial that the State court considered the case to be within the provisions of certain State's statutes. The grasp of the Federal statutes must first be released. The construction and scope of that are Federal questions, in respect to which the party who claims under such statute, and whose claim is denied, has a right to invoke the judgment of this court.

"Passing now to the question of error: It appears that prior to the date of the contract, Carkins had been in possession of the whole quarter-section; that he had held it as a timber claim from 1878 to the time of the contract; that he had broken and cultivated forty acres, and planted twenty acres of timber; that the improvements he had thus made were of the value of one thousand dollars; that Anderson was unable to pay cash for these improvements, and so the arrangement was made by

which Carkins relinquished his possession to Anderson and the latter was to enter into possession, to acquire title under the Homestead Act, and to convey one-half of the land in payment for these improvements. This consideration was ample, and the only question is as to the validity of the contract to convey. The theory of the Homestead Law is that the homestead shall be for the exclusive benefit of the homesteader. Section 2290 of the Revised Statutes provides that a person applying for the entry of a homestead claim shall make affidavit that, among other things, "such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person." And section 2291, which prescribes the time and manner of final proof, requires that the applicant make "affidavit that no part of such land has been alienated, except as provided in section 2288, which section provides for alienation for "church, cemetery or school purposes, or for the right of way of railroads."

"The law contemplates five years' continuous occupation by the homesteader, with no alienation except for the named purposes. It is true that the sections contain no express prohibition of alienation, and no forfeiture in case of alienation; yet, under them the homestead right can not be perfected in case of alienation, or contract for alienation without perjury by the homesteader. Section 2304 makes provision for homesteading by soldiers, and officers who served in the army of the United States during the recent war; but that section makes no substantial change, except in respect to the time of occupation. Under this section Anderson perfected his homestead right; but the question of the length of occupation required to perfect such right in no manner affects the controversy. The same affidavits in respect to alienation are required from Federal soldiers as in other cases of homesteaders. This precise question was before the Supreme Court of Kansas, when the writer

of this opinion was a member of that court; and speaking for that court he thus stated the arguments and conclusions:

"Now it is argued on the one hand that it is a matter of course for a court of equity to decree a specific performance of a contract for the conveyance of real estate, except in cases where it is shown to be unjust an inequitable to do so (Waynick vs. Richmond, 11 Kan. 488); that there is no express prohibition on alienation by a homesteader, or a forfeiture for such alienation; that the only thing which stands in the way of such an alienation is the perjury imposed upon the homesteader; that no man should be permitted to plead his own wrong in avoidance of his contract; that in this case there was no direct alienation, but only a contract to alienate in the future; that whatever of wrong the homesteader might be guilty of, the government alone could take advantage of, while he himself was estopped to plead it; and further, that the homestead is for the benefit of the homesteader, and that he should be permitted, by contract or otherwise, to make all the profit he can out of it. On the other hand, it is contended that the homestead is a gift from the government to the homesteader, conditioned upon his occupation for five years and upon his making no disposition or alienation during such term; that the affidavit of non-alienation is as clear an expression of the legislative intent as a direct prohibition; that the whole policy of government in this respect would be thwarted if the homesteader were permitted to alienate prior to the expiration of the five years; that a successful alienation could be accomplished only by perjury, and an attempted alienation would only offer a constant inducement to the homesteader to abandon his occupation, and thus deprive the purchaser of any possibility of acquiring title to the land; that a contract whose consummation necessarily rests on perjury is illegal; that both purchaser and vendor are parties to the wrong and that courts refuse to enforce such contracts, not from any regard to the vendor, but from motives of public policy; and finally that courts of equity have always exercised

a discretion in enforcing the specific performance of contracts to convey, and that it would be strange indeed if a court of equity lent its aid to enforce the performance of a contract founded upon perjury and entered into in defiance of a clearly expressed will of the government. We think the latter reasoning correct, and that, whether the contract be absolutely void or not, it is so clearly against the will and policy of the government, and so necessarily resting upon perjury, that a court of equity will have nothing to do with it." Mellison vs. Allen, 30 Kan. 882-884.

"Similar views were expressed by the Supreme Court of Nebraska, in the case of Dawson vs. Merrille, 2 Neb. 119, in which it was held that "the policy of the Act of Congress granting homesteads on the public lands as disclosed by its requirement of affidavit and other provisions, is adverse to the right of a party availing himself of it to convey, or agree to convey, the land, before he receives the patent therefor;" and that "the court will not lend its aid to the enforcement of a contract which is against public policy." And the judgment of the trial court denying specific performance of a contract for the sale of lands, made by the homesteader before he had acquired the legal title to the premises, was affirmed. See also Oaks vs. Heaton, 44 Iowa, 116; Nichols vs. Connoil, 51 Ark. 96. This very contract was before the Department of the Interior and its invalidity adjudged by the Secretary, in the case of Aldrich vs. Anderson, 2 Land Dec. 71.

"There can be no question that this contract contemplated perjury on the part of Anderson, and was designed to thwart the policy of the Homestead Laws, to secure for the benefit of the homesteader the exclusive benefit of his homestead right. Such a contract is against public policy, and will not be enforced in a court of equity. Such being the scope and purpose of the Federal statutes, it is not within the power of a State, directly or indirectly, to nullify or set them at naught. Suppose that the State of Nebraska had passed an act declaring

that, notwithstanding the provisions of the Federal statute, a homesteader might, before his homestead right was perfected, make a contract to convey, could it be doubted that such an act would be void, as it conflicts with paramount provisions of the Federal statute? Can the policy of Congress, with respect to the disposition of public lands, be thwarted by any State? The question suggests its own answer. The law of Congress is paramount; it can not be nullified by direct act of any State, nor the scope and effect of its provisions set at naught indirectly. But we do not think that the sections of the Nebraska Statutes cited by the Supreme Court were intended to nullify the provisions of the Act of Congress, or have any such effect. Those sections, Nos. 1 and 2, Compiled Statutes of Nebraska, Chapter 38, 376, read: "All contracts, promises, assumpsits or undertakings, either written or verbal, which shall be made hereafter in good faith and without fraud, collusion or circumvention, for sale, purchase or payment of improvements made on the lands owned by the government of the United States shall be deemed valid in law or equity, and may be sued for and recovered, as in other contracts." "All deeds of quit-claim or other conveyance of all improvements made upon public lands shall be as binding and as effectual in law and equity between the parties for conveying of the title of the grantor in and to the same, as in cases where the grantor has the fee simple title to the premises." But these refer simply to contracts for the sale and conveyances of improvements upon public lands. They are in terms limited to the matter of improvements, and do not touch in any way the land itself, whether in respect to the conveyance or contract to convey. They may, if valid, establish the sufficiency of the consideration paid by Carkins, but they do not affect at all the question of the validity of Anderson's contract to sell the land. Suppose Carkins' transfer of possession and improvement on the land is, as affirmed under these sections, a good consideration, it is no better consideration than so much money; and Carkins' right to compel a conveyance by Anderson would have been no weaker

if he had paid him a thousand dollars in money, than it is now when he simply transfers to him improvements on the land of the value of one thousand dollars.

"We agree with the Supreme Court of Nebraska that the consideration passing from Carkins to Anderson was a good and valuable one; and yet that brings us no nearer the question of the validity of Anderson's contract to convey. The fact that Anderson has received full payment for the land only makes stronger the fact that perjury on his part was essential to his obtaining the title, for clearly it was not then to be obtained for him but for Carkins; and does not in the least militate against the public policy disclosed in the Federal Statutes, that the acquisition of title must be for the exclusive benefit of the homesteader. It may be that Carkins can recover from Anderson the value of these improvements, on the ground that Anderson has received that for which he has paid nothing; for in such an action Carkins will not be seeking to enforce an illegal contract. To that effect are the cases of Simmons vs. Yurann, 11 Neb. 518; Bateman vs. Robinson, 12 Neb. 511; but that is very different from the enforcement of a contract which is illegal, because against public policy. The Supreme Court of Nebraska, recognizing the general rule as to the invalidity of contracts against public policy, seemed to think that the parties were not in pari delicto; but we are unable to see any distinction in moral status between the man who contracts for the perjury of another and the one who contracts to commit such perjury. The fact that the former party may have parted with money or valuable property does not change the quality of his action, or give him higher claim to the consideration of a court of equity. So it results that the Federal question in this case was not rightly decided in the State court; and no other question appears, which, rightly decided, upholds the decree. The case therefore must be reversed, and remanded to the Supreme Court of the State of Nebraska for further proceedings in accordance with this opinion; and it is so ordered."

Anderson vs. Carkins, 135 U. S. 483-491; 34:272.

Much that is said in the foregoing opinion is applicable to the case at bar. There is no pretense that there is any statute of Mississippi which authorizes such a contract as this to be made, and if there were it would be void; the Mississippi court did not endeavor to sustain its action on the ground of any State statute, or State decision, but placed its action solely on the Federal statutes pertaining to homesteads.

It has been decided by the Mississippi Supreme Court that growing timber is part of the realty and that a conveyance of timber with an indefinite time for removal is an incumbrance on the land.

McKenzie v. Shows, 70 Miss., 388.

Harrel v. Miller, 85 Miss., 70.

That the Supreme Court of Mississippi was in error in assuming that the money paid by Norwood & Butterfield Company to Essu Harness was to enable Harness to perfect his homestead entry, we call attention to the timber deed from Harness to Norwood & Butterfield Company, which conveys the timber with no time fixed for its removal. See record page six (6) and seven (7). Instead of enabling him to perfect his homestead entry so that he could enjoy the exclusive use and benefit of same, the timber deed places his homestead absolutely in the control of Norwood & Butterfield Company. His homestead is valueless unless he can use it and it can not be used until the timber is removed, and of course the owner of the timber will not consent to its removal until it suits his convenience. The very purpose of the homestead laws was entirely thwarted in this instance; so much so that Harness, although making affidavit that he desired the homestead land for his own use and benefit, the truth of the matter is he was endeavoring to get it for the use and benefit of another party, an arrangement prohibited by law.

The conveyance by Harness to Hartman, plaintiff in error, of the land after the making of his final proof, without excepting therefrom the timber previously conveyed to Norwood &

Butterfield Company, was a disaffirmance of the void contract between Harness and Norwood & Butterfield Company, and transferred to plaintiff in error all the rights vested in Harness. In a suit by Norwood & Butterfield Company against Harness with the facts developed the courts would leave them where it found them. Hartman's deed being of record constructive notice was thus given to the defendant in error of all the rights claimed or asserted by Hartman and the case should be disposed of just as though it were a suit between the original parties to the contract. The court should not lend its aid to either party.

We respectfully submit that the judgment of the Supreme Court of Mississippi in this case ought to be revered.

P. Z. JONES,
Attorney for Plaintiff in Error.

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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

[redacted] No. 44.

F. H. HARTMAN, PLAINTIFF IN ERROR,

vs.

BUTTERFIELD LUMBER COMPANY, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

HOLMES CONRAD,
For Butterfield Lumber Co.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 15883

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 288.

F. H. HARTMAN, PLAINTIFF IN ERROR,

vs.

BUTTERFIELD LUMBER COMPANY, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

The Case.

Prior to December, 1902, Esau Harness applied, under the homestead laws of the United States, for a tract of land situated in the county of Lincoln and State of Mississippi, and, having complied with all the requirements of said laws, he received a patent for said tract of land in December, 1892.

Prior to the 28th of January, 1893, the said Esau Harness did, by contract, agree to sell to Norwood & Butterfield Company all the pine timber on said tract of land and to convey to said company a right of way through said tract for a railroad, such way to be one hundred feet wide, to be laid off at the pleasure of said company. On the 28th January, 1893, the said Esau Harness and his wife did, by deed, convey said timber and right of way.

By deed of September 1, 1900, the Norwood & Butterfield Company did, by deed, convey both timber and right of way to the Butterfield Lumber Company.

Prior to the 30th day of January, 1893, Esau Harness and others were indebted to one F. H. Hartman, the plaintiff in error here, and on that day they, with other persons, executed their note to said Hartman for $444, and said Hartman then agreed to advance to all said persons such supplies and merchandise as they might need during the year 1893. Whereupon all said persons united in a deed of trust, whereby they conveyed to one W. F. Parsons the tract of land above referred to, and also certain personal property, to be held by said Parsons in trust to secure the payment of said note and of the purchase-money for such supplies as might be advanced, with power in said trustee to sell said land upon conditions set forth in said deed (Record, pages 10, 11).

Parsons, trustee, by direction of Hartman, the creditor secured in the deed of trust, did on December 14, 1894, offer the tract of land above referred to at public sale under the deed of trust, and the same was knocked down to the said F. H. Hartman, who was the highest bidder, and on the same day the said W. F. Parsons conveyed the land to the said Hartman by deed (Record, page 12).

In August, 1891, the Butterfield Lumber Company brought its bill in equity, in the second district chancery court, Lincoln county, Mississippi, against the said F. H. Hartman, and charged, among other things, that he was a purchaser of said tract of land, with full notice of the rights thereto previously acquired by said company, under the contract with Esau Harness. The defendant Hartman virtually admits the allegations of the bill, but denies actual notice of the said contract.

The case appears to have been decided by the court, not on the questions of facts presented in the pleadings, but on the ground that Harness had contracted to sell the land be-

fore he had obtained a patent therefor from the United States, and that in doing so he had been guilty of a violation of sections 2290, 2291, 2296, &c., Revised Statutes of the United States, and it accordingly dismissed the bill. On appeal to the supreme court of the State of Mississippi the decree of the lower court was reversed, and that court adjudged and decreed that the trustee's deed to Hartman, so far as it conveyed the pine timber and the right of way, was canceled and held for naught, and the title thereto was held to be in the Butterfield Company.

The decree of the supreme court of Mississippi, and the reasons for it, as they appear in the opinion of the court, will be found on pages 20–21, Record. From this decree a writ of error from this court is resorted to for relief.

The assignments of error present the Federal question suggested by the supreme court of Mississippi as the probable ground of the decree of the lower court.

The assignments of error on this point are as follows, viz. (Record, page 29):

1. The contract between Esau Harness and Norwood-Butterfield Company was against public policy and void.

2. The contract was invalid, founded on perjury, and entered into in defiance of a clearly expressed will of the Government.

3. The contract rested on perjury and was void.

ARGUMENT.

The errors assigned are not supported by any facts established by the proofs in this case, as abundantly appears by the transcript of the record here.

(1.) By section 2290, Revised Statutes, as amended by act of March 3, 1891 (26 St., 1095), 1 Suppl't R. S., p. 942, it is provided:

> "That any person applying to enter land under the preceding sections shall first make and subscribe before the proper officer and file in the proper land office, an affidavit * * * that he or she has not directly or indirectly made, and will not make any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the *title* which he or she might acquire from the Government of the United States, should accrue in whole or in part to the benefit of any person except himself or herself."

Section 2288, Revised Statutes, provides that—

> "Any person who has already settled or hereafter may settle on the public lands * * * by virtue of the homestead law, shall have the right to transfer by warranty against his own acts, any portion of his homestead for church, cemetery or school purposes, or for the *right of way of railroads across* such pre-emption or homestead, and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to their pre-emption or homestead."

It is evident, then, that a homesteader who, before obtaining his patent, sells the right of way for a railroad across the land on which he has settled does not thereby vitiate his right to complete his title and obtain his patent.

The contract between Esau Harness and the Norwood & Butterfield Company for the sale of such right of way was not invalidated thereby.

The contract for the sale of the pine timber on said land was equally valid and unobjectionable. The homestead is granted to encourage settlers in good faith to take and cultivate the public lands. Cultivation is the main purpose and object. In order to cultivation the lands must be cleared of timber. This is as essential as the breaking of the virgin soil. The homestead laws do not in letter or in spirit prohibit this. What they do prohibit is the sale of the title to the land, in whole or in part, and a sale of the timber is not a sale of the title to the land. They prohibit persons obtaining lands for speculation under the guise and pretext of obtaining a homestead for themselves and their families.

In *Anderson vs. Carkins*, 135 *U. S.*, 483, the beneficent policy of the United States in the homestead laws and the restrictions imposed upon alienation and the reasons therefor are fully stated: "The homestead is a gift from the Government to the homesteader, conditioned upon his occupation for five years, and upon his making no disposition or alienation during the term."

(2.) Esau Harness did not make this contract "during the term" of the five years, but made it only after he had obtained his patent.

Neither the patent itself nor any excerpt from the record of the application for the patent was offered in evidence in this case. The only testimony or proof of any kind as to the date of the patent is to be found in the testimony of Esau Harness himself.

He says (Record, p. 8) that he was at one time the owner of the land and timber thereon involved in this suit, having received a patent thereto from the United States Government in December, A. D. 1892. He says further he never

signed but one written instrument in favor of Norwood & Butterfield Co. He agreed to sell timber to it before and after he made final proof under homestead laws of United States, and made deed after making such final proof.

It is not charged in the bill or averred in the answer what the date of the parol contract was or when it was made, nor is it anywhere averred that it was made before the issuing of the patent.

The Federal question was not set up in the pleadings or the proofs, nor, indeed, is it hinted at in the final decree of the chancery court, which dismissed the bill of complainant (Record, p. 17). It first appears as a surmise or conjecture in the opinion of the supreme court (Record, p. 20), and it does not appear that it was the subject of contention or argument by counsel before that court. It is enough, however, for the purposes of this brief, to suggest that even if it should be found to have been so presented as to warrant this court in considering it at all, it will be further found that no adequate ground for its support can be gleaned from this transcript.

HOLMES CONRAD,
For Butterfield Lumber Co.

Supreme Court of the United States.

No. 44.—October Term, 1905.

F. H. Hartman, Plaintiff in Error, vs. Butterfield Lumber Company. } In error to the Supreme Court of the State of Mississippi.

[November 27, 1905.]

In December, 1892, Esau Harness received a patent from the United States for 160 acres of land in Lincoln County, Mississippi. On January 28, 1893, he conveyed to the Norwood and Butterfield Company all the pine timber on the land and "and a right of way through and across the land for roads, trams or railroads 100 feet wide." This instrument was filed for record February 10, and the complainant below (defendant in error here) subsequently obtained a deed from the Norwood and Butterfield Company. On January 30, 1893, the patentee conveyed his entire interest in the land as security for supplies and merchandise to be furnished by Hartman, the plaintiff in error (defendant below), during the year 1893. This deed was filed for record January 31, 1893. On December 14, 1894, the trustee therein named sold and conveyed the land to Hartman.

This suit was brought in the Chancery Court of Lincoln County, Mississippi, to establish the prior right of the complainant to the timber and right of way. The bill charged that the defendant had actual notice of the conveyance from the patentee to the Norwood and Butterfield Company when he accepted the trust deed from the patentee, and therefore that he was subordinated in right to those claiming under the first conveyance, although it was not placed on record until after the execution and record of the deed of trust. It appeared in the testimony that prior to the patent the patentee had contracted with the Norwood and Butterfield Company to convey to it the timber and right of way. He himself testified that he had made such a contract, both before and after he had received the patent. The Supreme Court of the State, deciding in favor of the complainant, 82 Miss. 494, considered the effect of the contract made before the patent upon the validity of the subsequent conveyance to the Norwood and Butterfield Company, saying:

"We are driven to the conclusion that the decree of the court below must have been the result of an opinion that the agreement between Esau Harness and the grantor of appellant that, in consideration of the advance money to perfect his homestead entry and get his patent, Esau would sell the timber on the land in controversy, was against public policy and

void, and made void also the subsequent sale of the timber to reimburse for that advance. We are not in accord with that view. Rev. St. U. S. sections 2290, 2291, 2296 (U. S. Comp. St. 1901, pp. 1389, 1390, 1398), with Gould & Tucker's notes, vol. 1, p. 537. On the testimony we cannot escape the conviction that the appellee had such notice as should put any reasonable man on inquiry, which would have disclosed the existence of the conveyance of the timber and right of way by Esau to the grantor of appellants.

"Reversed, and decree here in accordance with the prayer of the bill."

Mr. Justice BREWER delivered the opinion of the Court.

For the purposes of this case it may be conceded that the contract made before the patent was, by virtue of the policy of the United States as disclosed in its statutes, void, and could not have been enforced by the Norwood and Butterfield Company, but the contract was not inherently vicious or immoral. It was simply void because in conflict with the Federal statutes. *Anderson* v. *Carkins*, 135 U. S. 483. When the patent issued the full legal title passed to the patentee. He could do with the land that which he saw fit, sell or give it away, and if he voluntarily conveyed it he could not thereafter repudiate the conveyance. He may well have thought that having received money from the company to enable him to pay for the land it was equitable that he should convey that interest which he had agreed to convey. At any rate, he had a right to exercise a choice in the matter, and having exercised it he at least cannot complain. Whether the Government could challenge the conveyance we need not determine, for if it had any right to interfere, it has not chosen to do so. It is generally true that an executed contract, voluntarily executed, without fraud or duress, is binding and cannot be repudiated by the party who executed it. In *Bibb* v. *Allen*, 149 U. S. 481, 497, Mr. Justice Jackson, speaking for the court, thus stated the law:

"It is well settled by the authorities that the defense of the statute of frauds cannot be set up against an executed contract. *Dodge* v. *Crandall*, 30 N. Y. 294, 304; *Brown* v. *Farmers' Loan and Trust Company*, 117 N. Y. 266, 273; *Madden* v. *Floyd*, 69 Ala. 221, 225; *Gordon, Rankin & Co.* v. *Treedy*, 71 Ala. 202, 214; *Huntley* v. *Huntley*, 114 U. S. 394, 400; Browne on Statute of Frauds, sec. 116. This rule proceeds and rests upon the principle that there is 'no rule of law which prevents a party from performing a promise which could not be legally enforced, or which will permit a party, morally but not legally bound to do a certain act or thing, upon the act or thing being done, to recall it to the prejudice of the promisee, on the plea that the promise, while still executory, could not by reason of some technical rule of law have been enforced by action.' *Newman* v. *Nellis*, 97 N. Y. 285, 291."

St. Louis Hay &c. Co. v. *United States*, 191 U. S. 159, 163.

It is also well settled that one whose interest in land is acquired subsequently to a conveyance thereof by the owner has no higher right to question

the conveyance than his grantor had. This does not conflict with the rule that a conveyance fraudulent against creditors may be set aside at their instance; for their rights exist prior to the conveyance, or if not, the conveyance was made with the purpose on the part of the grantor of defrauding them out of debts subsequently contracted. Nothing of that kind appears here. Hartman, at the time of the conveyance, had no claim against the patentee. The conveyance was not made with the purpose of subsequently contracting a debt and defrauding him out of payment thereof. His trust deed was executed after the conveyance to the Norwood and Butterfield Company and for the purpose of securing debts thereafter to be contracted, and he took with knowledge of the conveyance.

The judgment of the Supreme Court of Mississippi was right, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 44.—October Term, 1905.

F. H. Hartman, Plaintiff in Error, vs. Butterfield Lumber Company. } In error to the Supreme Court of the State of Mississippi.

[November 27, 1905.]

Mr. Justice White, dissenting:

The reasons for my dissent are stated, not only because of what seems to me is the encouragement afforded to frauds on the homestead law by the ruling now made, but also because of the possible injurious consequences to arise from the application hereafter of the assumed legal principles upon which the ruling is based.

These are the facts: Harness entered the homestead. Before he had performed the conditions required by the law of the United States to entitle him to a patent, he made a contract with the Norwood and Butterfield Company, to convey to them, when he received a patent, the pine timber on the land and a right of way through and across the land for roads, trams or railroads one hundred feet wide. Harness ultimately filed the proofs required by the acts of Congress; in other words, made an affidavit, as required by law, to the effect that he had the sole interest in the land, and that there was an absence of interest in anybody else. Obtaining the patent, he made the stipulated conveyance to the Norwood and Butterfield Company, who afterwards conveyed to the Butterfield Lumber Company, defendant in error. Before this deed, however, was recorded, as required by the laws of Mississippi, Harness mortgaged the land to Hartman, plaintiff in error, and the mortgage was at once recorded. Thereafter the deed was recorded. Soon afterward the Butterfield Company filed its bill in a court of chancery in Mississippi to establish its alleged prior rights under the deed from Harness, and it was averred that Hartman accepted the mortgage to him with notice of the prior transfer, and therefore took subject to the deed.

That a Federal question was present is conceded, in view of the fact that the Mississippi court applied the laws of the United States in determining the validity of the contract and the deed. Having decided that they were valid, and that Hartman had notice of the transaction before the execution of the mortgage, the State court further held that the rights of Hartman were subordinate to those conferred by the contract and deed. I do not stop to demonstrate that a contract made by a homesteader to

convey to another, when a patent is obtained, a right to strip the land of all the timber and to vest in such party a right of way for a tramway to make the removal of the timber effectual, is void under the homestead laws of the United States. This I do not feel called upon to do, because the court in deciding this case expressly assumes that the contract to convey the timber was void, and bases its ruling upon that assumption, citing *Anderson* v. *Carkins*, (135 U. S. 483.) But at the same time it is declared that although the contract was void, by virtue of the policy of the United States as disclosed in its statutes, such contract was not inherently vicious or immoral. The deduction seems to me to be unwarranted. Considering a contract of this nature, in *Anderson* v. *Carkins*, it was said:

"There can be no question that this contract contemplated perjury on the part of Anderson, and was designed to thwart the policy of the Government in the homestead laws, to secure for the benefit of the homesteader the exclusive benefit of his homestead right. Such a contract is against public policy, and will not enforced in a court of equity."

And the doctrine of *Anderson* v. *Carkins*, which is conceded applies to this case, was reiterated in *Adams* v. *Church*, (193 U. S. 510, 515.)

It having been impossible for the homesteader, without fraud and perjury, to execute the contract to strip the land of its timber and give a right of way for a tramway to make the stripping effectual, it seems to me that it cannot be said that it was not immoral and vicious. And when the necessary effect of the contract is thus fixed, it is submitted that it becomes at once patent that decisions holding that executed contracts are not affected by the statute of frauds have no application to this case, for, as said by Mr. Justice Jackson, in the case relied upon to demonstrate the doctrine, (*Bibb* v. *Allen*, 149 U. S. 497,) "contracts not in conformity with the statute (of frauds) are only voidable and not illegal."

It is said, however, that Harness made a deed in accordance with the contract, and this suit involves not the contract but the deed. But unless this proceeds upon the assumption that the contract was merely voidable and not illegal, as being contrary to public policy, it seems to me to be a plain misconception. This is said, since it cannot be that a court of equity will not enforce the specific performance of a contract which is void as against public policy, but yet will lend its aid to one of the parties by enforcing a deed which permits the fruits of the void contract to be realized.

As said in *Deweese* v. *Reinhard*, (165 U. S. 386,) a case concerning the homestead laws:

"A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity."

And especially must this be true where, as here, one of the parties to an illegal and void transaction invokes the aid of equity to give efficacy to perjury and a violation of public policy.

But it is asserted that whatever may be the right of the United States to assail the conveyance in question, neither the grantor nor his assignee has such right. Here, again, it seems to me clear that the distinction has been lost sight of which exists between contracts which are merely voidable and those which are void because contrary to public policy. That in a case of the latter character either party to the unlawful transaction or those in privity with them may be heard to contest the right of one of the wrongdoers to the active aid of a court of equity in making the illegal act effective, has long since been decided by this court. (*Harkness* v. *Underhill*, 1 Black, 316, 325.)

I therefore dissent.

True copy.

Test:

Clerk Supreme Court, U. S.